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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

SWITCHMEN'S UNION OF NORTH AMERICA, An Unincorporated Labor Union; R. H. MORITZ; L. B. HILL; and V. H. WORKMAN, *Petitioners,*

v.

THE OGDEN UNION RAILWAY AND DEPOT COMPANY, A Corporation; and BROTHERHOOD OF RAILROAD TRAINMEN, An Unincorporated Labor Union.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Switchmen's Union of North America, R. H. Moritz, L. B. Hill and V. H. Workman pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on January 2, 1954.

OPINIONS BELOW

The opinion of the District Court (oral statement R. 275-279) is unreported. The opinion of the Court of Appeals (R. 286-290) is reported in 209 F. 2d 419.

JURISDICTION

The judgment of the Court of Appeals was entered on January 2, 1954 (R. 291). On March 31, 1954, by order of Mr. Justice Clark, the time in which the petitioners might file a petition for a writ of certiorari in this case was extended to and including May 3, 1954 (R. 291). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether a carrier interferes with, influences, or coerces its employees in the exercise of, or denies them, rights of choice of representatives and membership in labor organizations, in violation of Section 2, Third and Fourth, of the Railway Labor Act, as amended, by adhering to and enforcing a collective bargaining agreement which:

(a) Gives the exclusive collective bargaining agent discretionary control over certain aspects of employment, by requiring the carrier, unless it secures the consent of the exclusive collective bargaining agent, to refuse reinstatement to employment, after a break in service of six months or more, to any employee who has not chosen such exclusive collective bargaining agent or another named union to represent him in the handling of his claim for reinstatement.

(b) Discriminates against employees seeking reinstatement to employment who do not choose to be represented in the handling of their reinstatement claims by the exclusive collective bargaining agent or one other named union, by preventing their reinstatement without the consent of the exclusive collective bargaining agent, and in favor of employees who do choose to be so represented, by permitting their reinstatement by the carrier without such consent.

2. Whether the refusal of a carrier, acting pursuant to the collective bargaining agreement described in Question 1,

to reinstate an employee solely because the exclusive collective bargaining agent has not consented thereto, violates Section 2, Third and Fourth, of the Railway Labor Act, as amended.[1]

STATUTE INVOLVED

Section 2, Third and Fourth, of the Railway Labor Act, as amended (45 U.S.C. 152, Third and Fourth), insofar as here material, provides as follows:

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[1] The carrier admitted that the sole reason for its refusal to reinstate the three individual petitioners was the failure of the Trainmen's Union to consent (R. 45-46, 56-58, 80, 229). In Finding XVII (R. 177), the District Court found that on September 22, 1952, the carrier refused reinstatement until such time as the union concurred. However the District Court in Finding XXIII (R. 178) recited that at the time this suit was begun the individual petitioners sought back pay, the carrier was never willing to give them back pay, and the failure of the union to consent "is" not the sole cause of the carrier's refusal to reinstate. Since the District Court's findings (Findings XV, XVII, XVIII, R. 176-177) disclose that there was no request for back pay at the time the refusals to reinstate occurred on September 22, 1952, the word "is" in Finding XXIII may be read literally as having reference only to the carrier's refusal to reinstate after this suit was begun (R. 218-219). In the event Finding XXIII is read as meaning that the carrier's pre-suit refusals were motivated by reasons other than the failure of the union to consent, should certiorari be granted, we will urge that Finding XXIII is unsupported by any evidence. The record is clear that from June 13, 1952 (R. 229, 17-18, 100-102) until subsequent to the carrier's unequivocal letters of September 22, 1952, making reinstatement conditional upon the consent of the Trainmen's Union (R. 217, 21, 107, 108), the individual petitioners asked reinstatement without back pay (R. 217, 229). Nor is there a scintilla of evidence that after that date the individual petitioners would ever have refused reinstatement without back pay or that any request on their part for back pay motivated the carrier in the slightest respect in its failure to reinstate them. In the present suit counsel for the petitioners has made it clear that the individual petitioners are suing only for back pay from and after the date the carrier would have reinstated them but for its insistence upon the consent of the Trainmen's Union (R. 220, 239).

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. * * *

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. * * * No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization * * * "

STATEMENT

This suit was brought in the United States District Court for the District of Utah by the three individual petitioners, Moritz, Hill and Workman, and by the Switchmen's Union of North America, to enjoin the Ogden Union Railway and Depot Company, hereinafter called the carrier, and the Brotherhood of Railroad Trainmen, hereinafter called the Trainmen's Union, from giving effect to a provision in the collective bargaining agreement between the carrier and the Trainmen's Union known as the Note to Article VIII, Rule 38, and to require the carrier to reinstate the three individual petitioners to their former employment with back pay (R. 3-14, 91-99). The petitioners attacked the validity of the Note and the refusal of the carrier to reinstate the individual petitioners as violative of Section 2, Third and Fourth, of the Railway Labor Act, as amended (R. 5-7, 98-99). The case was tried on the merits in the

District Court (R. 180-225). Most of the material facts were alleged in the second amended complaint (R. 91-99, 3-14) and admitted by the answers (R. 108-113, 114-118). There was no conflict in any of the testimony given at the trial (R. 180-225). The undisputed facts as found by the District Court are as follows:[2]

The individual petitioners, Moritz, Hill and Workman, were each employed by the carrier as a yard switchtender (R. 173-174; 4, 92, 109, 183, 185, 187). On March 8, March 11, and April 2, 1952, respectively, the carrier terminated the employment of Moritz, Hill and Workman for infractions of its rules (R. 176; 4, 93, 110, 183, 185, 187). Each of the three was, prior to, at the time of, and at all times since his purported dismissal, a member of the Switchmen's Union and gave the Switchmen's Union his power of attorney to represent him in handling his claims with the carrier (R. 176; 7, 15-16, 93, 94, 100, 184-186, 188).

The Switchmen's Union presented the claims of Moritz, Hill and Workman for reinstatement to the carrier (R. 176; 7-8, 16-20, 94, 100-104, 110-111, 194-197, 224-225). The carrier handled the application for reinstatement of Moritz, Hill and Workman with the Switchmen's Union and negotiated fully and freely through correspondence and personal conferences with the Switchmen's Union as the designated representative of the individual petitioners (R. 177; 7-8, 18-20, 94-95, 102-106, 110-111, 194-195, 224-225). On September 22, 1952 the carrier advised the Switchmen's Union that it had referred each of the individual petitioners' cases to the Trainmen's Union, that the latter had not yet handled the cases nor indicated its concurrence in the return to service of the individual petitioners and that the carrier refused reinstatement of each of the individual petitioners until such time as it received the concurrence thereto of the Trainmen's Union (R. 177; 8-9, 21, 45-46, 56-58, 80, 95, 97, 98, 107-108, 111, 113, 229). In so refusing rein-

[2] In the following statement the references preceding the semicolons are to the findings of the District Court; the succeeding references are to the supporting evidence.

statement until the Trainmen's Union should concur in such reinstatement the carrier relied upon a Note to Article VIII, Rule 38 of a collective bargaining agreement entered into between the carrier and the Trainmen's Union on October 1, 1942 (R. 174-175, 177; 4-9, 21, 45-46, 56-58, 95, 97, 98, 107, 108, 109, 111, 112-113, 229). The Note in question reads as follows (R. 175; 4-5):

> "Note—Reinstatement will not be permitted after the expiration of six months from date of dismissal unless agreeable to the management and the general committee,[3] except that a case pending with either the B.R.T.[4] or O.R.C.[5] at the expiration of the six month period, will not be prejudiced. Where the yardman involved has been out of service six months or less it will not be obligatory to consult the committees representing these classes of employes in considering the case for reinstatement."

The Trainmen's Union is now and at all times here material has been the exclusive collective bargaining representative of the yardmen employed by the carrier (R. 174; 4, 112-113).

The District Court concluded as a matter of law that the Note was lawful, that the carrier had not applied the Note in a discriminatory manner and had not violated the Railway Labor Act (R. 178-179).[6]

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[3] The phrase "general committee" in the Note refers to the committee of the Trainmen's Union which acts for the Trainmen's Union in the handling of claims with the carrier.

[4] The initials "B.R.T." in the Note refer to the Trainmen's Union.

[5] The initials "O.R.C." in the Note refer to the Order of Railway Conductors which like the Switchmen's Union is a minority union in reference to the craft or class of yardmen on the carrier.

[6] Although the District Court stated as a conclusion of law that the petitioners had not exhausted the administrative remedies which they have under the Railway Labor Act to present their claims before the National Railroad Adjustment Board (R. 179), it made no reference to this conclusion in its judgment which was entered on the merits.

The District Court accordingly entered its judgment expressly adjudging the Note and its application to the petitioners to be lawful and dismissing the case on the merits (R. 179-180).

Upon appeal to the United States Court of Appeals for the Tenth Circuit the judgment below was affirmed (R. 291).

In its opinion the Court of Appeals erroneously stated that the District Court had dismissed the case for want of jurisdiction (R. 286). The Court of Appeals stated that the District Court would have had jurisdiction of the case if the validity of the agreement had been involved (R. 288). It upheld the assumed dismissal because it agreed with the District Court that the Note was valid (R. 289). It reached this conclusion by observing that the Note dealt with the composition of the roster of employees of the carrier, "a matter certainly within the bargaining province of the two parties most affected," that "it is not fatal that the incidents of the contract may have unfavorable effects on some members of the craft represented" and that it was not here concerned with "a deliberate hostile bargaining attempt to discriminate against one group of employees in favor of another" (R. 289).

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that since the composition of the roster of employees of a carrier is a proper subject matter for collective bargaining it is not a violation of Section 2, Third and Fourth, of the Railway Labor Act, as amended, for a carrier to enter into a collective bargaining agreement which requires the consent of the exclusive collective bargaining representative before the carrier may reinstate employees who are not represented in the handling of claims for reinstatement by that representative but not before it may reinstate those so represented by that representative.

2. In holding that since a collective bargaining agreement may properly make differences between employees affected,

a provision adversely affecting employees only because they choose not to be represented by the exclusive collective bargaining representative in the handling of claims for reinstatement, does not violate Section 2, Third and Fourth, of the Railway Labor Act, as amended.

3. In holding that the Note to the collective bargaining agreement here involved is lawful.

4. In holding that the absence of a deliberate hostile attempt to discriminate prevented the carrier's conduct from constituting a violation of Section 2, Third and Fourth, of the Railway Labor Act, as amended.

5. In failing to hold that the carrier, by conditioning the right of the individual petitioners to reinstatement upon the consent of a union, violated Section 2, Third and Fourth, of the Railway Labor Act, as amended.

6. In holding that the carrier did not violate Section 2, Third and Fourth, of the Railway Labor Act, as amended, by refusing to reinstate the individual petitioners.

7. In holding that the instant suit did not involve the validity of a contract but solely its interpretation and application.

8. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in conflict with the principle of this Court's decision in *Radio Officers* v. *NLRB*, 347 U. S. 17. If Congress had not divided its legislation for railway and non-railway employees into two separate statutes there would be a square conflict. The period within which to petition the court below for a rehearing expired eleven days prior to this Court's decision in the *Radio Officers* cases, and therefore the court below did not have the advantage of this Court's guidance.

The decision of the court below leaves the meaning of Section 2, Third and Fourth, of the Railway Labor Act,

as amended, in opposition to and inconsistent with the construction placed upon its analogue in Section 8(a)(3), of the National Labor Relations Act, as amended (29 U.S.C. (Supp. V) Section 158(a)(3)), by this Court's decision in the *Radio Officers* cases.

While the words used in relevant portions of these two Acts are not the same, there is nothing in the difference in phraseology which in anywise supports the very opposite construction placed upon the Railway Labor Act by the court below as contrasted with this Court's construction of the National Labor Relations Act in the *Radio Officers* cases.[7]

Section 8(a)(3) of the National Labor Relations Act, as amended, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization". Section 2, Third, of the Railway Labor Act, as amended, provides that "neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives." Section 2, Fourth, provides that "No carrier * * * shall deny or in any way question the right of its employees to join, organize or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier * * * to influence or coerce employees in an

[7] This Court in the *Radio Officers* cases (347 U.S. at 48) cited cases arising under the Railway Labor Act. The comparable character of many of the substantive provisions of these two statutes has often been the subject of comment by this Court. It has cited cases under the two acts interchangeably and relied on cases under one act for construction of the other. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44, 45, 47; *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 188; *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 266-267; *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U.S. 342, 347; *J. I. Case* v. *NLRB*, 321 U.S. 332, 336; *Steele* v. *Louisville & Nashville R. R. Co.*, 323 U.S. 192, 200, 202; *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232, 238; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 332, n. 4, 337.

effort to induce them to join or remain or not to join or remain members of any labor organization".

Both *Radio Officers* and the instant case are characterized by the fact that the employers gave unions serving as exclusive collective bargaining agents the power to cause the employers to discriminate against employees at the discretion of the unions. Thus, the positions of the employers with respect to Fowler for example, in *Radio Officers,* and the three petitioners here, are parallel. The employers wanted to give jobs to the men involved. They had no reason for withholding the jobs other than the provision in the agreements which required prior approval by the union acting as exclusive collective bargaining agent. The employers in each case sought the approval of the unions, but were refused, as a result of which they denied the men jobs. Similarly, in *Teamsters,* decided with *Radio Officers,* unlawful discrimination was held to be present where a union was by contract given control over seniority and the union reduced the seniority position of an employee delinquent in his union dues. The employer accordingly denied that employee work assignments he would otherwise have received (347 U. S. at 26). In each the *Radio Officers,* the *Teamsters,* and the instant case the employer's refusal of jobs to the men was based solely on control lodged in the union over the employees' opportunity for employment.

In *Gaynor,* also decided with *Radio Officers,* the union serving as the exclusive collective bargaining agent negotiated an agreement which gave distinct pay and vacation advantages to those employees only who held membership in that union, over nonmembers. In the instant case, the exclusive collective bargaining agent entered into an agreement with the carrier which gave distinct reinstatement advantages to employees who chose to be represented in the handling of claims for reinstatement by the exclusive collective bargaining agent.

In the *Radio Officers* cases this Court held that where the conduct of the employers inherently encourages or discourages union membership, a violation of 8(a)(3) of the

National Labor Relations Act is established. This, it was held, is so even though the employers may have no desire to encourage union membership. "Since such encouragement of union membership is a natural and foreseeable consequence of any employer discrimination at the request of a union, those employers must be presumed to have intended such encouragement" (347 U. S. at 52). This Court held that the vesting of control over any aspect of employment in a union or giving advantages to one group of employees because of their union affiliation over another group of employees without similar union affiliations, was necessarily the type of conduct which had the natural and foreseeable consequence of encouraging or discouraging union membership in violation of the National Labor Relations Act (347 U. S. at 45-46). This holding was based on "a fact of common experience—that the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action" (347 U. S. at 46; cf. 51). This Court adverted to both the terms and the history of the union security amendments to the National Labor Relations Act as conclusive that Congress had forbidden utilization of a collective bargaining agreement, which did not contain the permissible form of union security provision, to affect employees' jobs or job opportunities in any way which would encourage or discourage employee choice of unions (347 U. S. at 41-42). It therefore found that "The policy of the Act is to insulate employees' jobs from their organizational rights" (347 U. S. at 40).

However, the court below, by making the absence "of a deliberate hostile bargaining attempt to discriminate against one group of employees in favor of another" (R. 289) controlling, adopted a subjective test, as opposed to the objective test applied by this Court in the *Radio Officers* case. By holding that "It is not fatal that the incidents of the contract may have unfavorable effects on some members of the craft represented relative to conditions of employment" (R. 289), the court ignored the necessary effect of the discrimination here involved to influence em-

ployees to choose the contracting union rather than some other union to represent them.[8] By holding that the Note here involved was valid because the "composition of the roster of employees" of a carrier is a proper subject for collective bargaining (R. 289), the court below ignored the fact that in the Railway Labor Act, as in the National Labor Relations Act, Congress, by the strict limitations it placed on union security agreements, has defined precisely the extent to which a carrier and a union may by collective bargaining agreement interfere with, influence or coerce employees in their choice of representatives.[9] The carrier and the exclusive collective bargaining representative in the instant case did not adopt a union-shop provision in the

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[8] The court below erroneously construed this Court's decision in *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, as justifying a contract which may have unfavorable effects on some members of the craft represented relative to conditions of employment (R. 289). This Court was not there faced with differences in treatment which interfered with the employees' choice of bargaining representatives. The employees there were differentiated between on the basis of their military service or lack of it, all union and nonunion members being affected in precisely the same manner (345 U.S. at 331-332, 335). This Court stated that there was nothing in the National Labor Relations Act to "compel a bargaining representative to limit seniority clauses solely to the relative lengths of employment of the respective employees" (345 U.S. at 342). As we have already seen, there are provisions in the Railway Labor Act which do bar a carrier and a union from limiting reinstatement rights in a manner which interferes with employee choice of representatives.

[9] Congress in 1951 recognized that Section 2, Fourth, prohibited all collective bargaining agreements which advantaged or disadvantaged employees on the basis of their choice of bargaining representative. In adopting the Union Shop Amendment to the Railway Labor Act (Act of January 10, 1951, c. 1220, 64 Stat. 1238, 45 U.S.C. (Supp. V) 152, Eleventh), it provided:

> "(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended."

agreement.[10] By failing to recognize any policy to insulate an employee's job from his organizational rights, the court below permitted certain aspects of an employee's employment rights to be contingent on the manner in which he exercised his organizational rights.

The instant case therefore presented a situation where the very same type of conduct of employers which was held in *Radio Officers* inherently to encourage or discourage membership in a labor organization in violation of Section 8(a)(3) of the National Labor Relations Act, has been held by the court below not to interfere with, influence or coerce employees in their choice of representatives in violation of Section 2, Third and Fourth, of the Railway Labor Act.

2. The decision of the court below in the instant case is similarly in conflict with the decision of the Court of Appeals for the Fifth Circuit in *NLRB* v. *Lummus Co.*, 210 F. 2d 377 (C.A. 5), and the decision of the Court of Appeals for the Second Circuit in *NLRB* v. *Gottfried Baking Co.*, 33 LRRM 2550 (C.A. 2, February 15, 1954), both cases arising under Section 8(a)(3) of the National Labor Relations Act.

In the *Lummus* case, where two job applicants were told by an employer that they could not be employed without first obtaining clearance from a certain union, the court held that the employer thereby necessarily violated Section 8(a)(3). The order enforced by the court required the employer to cease and desist from conditioning employment upon referral by a union. And in the *Gottfried Bak-*

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[10] Under the Railway Labor Act, not even a union security agreement could have deprived operating employees of the right to belong to and be represented by the Switchmen's Union for it is a union national in scope. According to Section 2, Eleventh (c), the requirements of a valid union-shop provision are satisfied if operating employees choose to become members of any of the unions, national in scope, which accepts those of their craft for membership, and there is no absolute requirement for joining the majority union. Then, only in the event of a failure to pay dues to one of the national unions may the employee's job be interfered with.

ing Co. case the court held that the mere execution of a collective bargaining agreement giving preferential employment to members of a certain union, even apart from its actual enforcement, places that union in a position of prestige and power enabling it to further the interest of its members to the disadvantage of non-members, thereby placing a premium upon membership in that union, and falls squarely within the prohibition of Section 8(a)(3) of the National Labor Relations Act.

3. The questions presented are important in the administration of the Railway Labor Act. Basic to all the provisions of the Railway Labor Act is the freedom of employees to self-organization and choice of representatives without interference, influence or coercion by the carrier. As interpreted by the court below, the carrier remains free to interfere with, influence or coerce its employees in the choice of representative so long as it accomplishes this by a collective bargaining agreement which shifts control of employment from the carrier to the union. Likewise the decision below leaves the carrier free to grant advantages to employees who are represented by one union and to withhold such advantages from others, so long as this is accomplished by a collective bargaining agreement. And by emphasizing the absence of a "deliberate hostile" attempt by the carrier to discriminate between union and non-union members, the court below makes the test of carrier violation of the Act the carrier's anti-union or pro-union animus rather than the natural and foreseeable consequences of its conduct.

The decision below means that the employees of industries subject to the Railway Labor Act do not have the same broad protection from employer interference, influence and coercion in their rights to self-organization and collective bargaining which are accorded to employees of other industries, despite the fact that Section 2, Third and Fourth, of the Railway Labor Act parallels Section 8(a)(3) of the National Labor Relations Act.

Although Section 8(a)(3) of the National Labor Relations Act has been before this Court for consideration in numerous cases, its analogue in Section 2, Third and Fourth, of the Railway Labor Act, as amended, has never been before this Court.[11] The importance of this section is reflected in the fact that it is the statutory provision which protects the rights of the Nation's entire force of railroad and airline employees to freedom in choosing their representatives and in joining or refraining from joining labor organizations.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be ganted.

Respectfully submitted,

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April 15, 1954.

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[11] Section 2, Third, of the Railway Labor Act, as originally adopted in 1926, was before this Court in *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U.S. 548, which was concerned primarily with questions of constitutionality rather than of construction.